Supreme Court, U.S.

97 • 229 AUG 6 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

WILLIAM HARMON,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E.J. LEIZERMAN
COUNSEL OF RECORD

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COUNSEL FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED

Should a decision of the United States Court of Appeals be reversed or vacated where one judge of the three judge panel was a former partner in the law firm representing the Respondent herein, had an extensive and continuing attorney-client relationship with that law firm, and participated in the decision of the case without disclosing those relationships to the parties or recusing himself prior to oral argument or decision.

LIST OF PARTIES

The Petitioner is William Harmon, an individual. CSX Corporation is the holding company of Respondent CSX Transportation, Inc.

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OPINIONS BELOW

The decisions of the United States District Court for the Middle District of Tennessee (App. G at A42; App. H at A44) are unreported. The Opinion of the United States Court of Appeals for the Sixth Circuit (App. F at A29) appears at 110 F. 3d 364 (6th Cir, 1997). The order of recusal of Hon. Gilbert Merritt (App. B at A3) is unreported.

JURISDICTION

The opinion of the Court of Appeals was entered on May 7, 1997 (App. F at A29). The order granting recusal (App. B at A3) and the order denying Petitioner's Petition for Rehearing (App. A at A1) were entered on May 9, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The Honorable Gilbert S. Merritt is an active member of the United States Court of Appeals for the Sixth Circuit. Judge Merritt, together with the Honorable James L. Ryan and the Honorable Richard F. Suhrheinrich, comprised the panel which heard and decided the appeal filed by the Petitioner.

Neither the nature nor the substance of the appeal to the Sixth Circuit is at issue in this Petition.[1] What is

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[1] Petitioner would note, however, that he disagrees with the accuracy of the factual assertions presented in the panel decision. Notwithstanding, they are not germane to the issue in this Petition.

significant is that Judge Merritt was formerly a partner in the law firm of Gullet, Sanford, Robinson & Martin, the firm which represented the respondent in the trial court and in the Court of Appeals. Judge Merritt also had a long-standing and continuous attorney-client relationship with that law firm and was an active client of the law firm at the time this case was briefed, argued, and decided.

Judge Merritt's apparent conflict of interest did not come to light until after the case was decided. On April 17, 1997, upon information and belief, counsel for Petitioner wrote to counsel for Respondent inquiring as to the relationship between Judge Merritt and the firm of Gullett, Sanford, Robinson & Martin (App. D at A18). Counsel for Respondent returned the correspondence on April 22, 1997, stating in relevant part:

> My firm is not representing Judge Merritt with regard to any trust matters right now, although I understand that he has one open property transaction file with my partner Allen Lentz.

This was the first time that counsel for Petitioner had any idea that a conflict of interest existed.

This correspondence was filed with the Sixth Circuit in support of Petitioner's Amended Petition for Rehearing (App. C at A9). It was Petitioner's contention that the panel decision should be vacated and the matter re-argued before a new panel to remove the taint caused by Judge Merritt's conflict of interest.

Contrary to Judge Merritt's statement in his order of May 9, 1997 (App. B at A3), he never disclosed either his prior partnership or his client relationship. In that order, Judge Merritt asserted that: "At the time this case was heard earlier this year, I disclosed my previous relationship with the Gullett law firm." This is not true, as evidenced by a

transcript of the oral argument transcribed from the audio tape obtained by Petitioner.[2] Moreover, while Judge Merritt acknowledges a post-hearing attorney-client relationship with Gullett, Sanford, Robinson & Martin, he fails to address a past or continuing attorney-client relationship. Wayne L. Robbins, Jr., Esq., counsel for Respondent, conceded that such a relationship existed in correspondence dated April 22, 1997 (App. C at A9). After further correspondence from Petitioner's counsel dated April 25, 1997 (App. C at A11), Mr. Robbins declined to clarify whether a continuing attorney-client relationship still existed during the appellate process.

ARGUMENT

The issue raised by this Petition far transcends whether the Petitioner, William Harmon, received a fair hearing before the three judge panel of the United States Court of Appeals for the Sixth Circuit. The question presented herein strikes at the very heart of the federal judiciary. The citizenry of the United States expect federal judges to be beyond reproach. Further, counsel practicing

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[2] Petitioner requested that the Sixth Circuit Court of Appeals prepare a transcript of oral argument for use in the preparation and presentation of this Petition. Because the Court of Appeals declined to prepare a transcript, Petitioner had one prepared by a reputable certified court stenographer in Ohio, from an audiotape provided by the clerk of the Court of Appeals. The identity of the speakers is accurate to the best of the Petitioner's knowledge given that counsel sat with the court reporter and attempted to identify each jurist's voice. Even if there are slight inaccuracies in identifying which Judge is talking, the content of the transcript is accurate. Nowhere is there ever an acknowledgment or even a mention of any relationship with Respondent's law firm.

before the Sixth Circuit need to be able to assure their clients that the court is above reproach. Yet, when a sitting Circuit Judge has an obvious conflict of interest and fails to disclose that interest to the parties to an appeal, the very foundation of the integrity of our judicial system is called into question. In this case Judge Merritt sat in judgment knowing of his past, recent and/or continuing client relationship with the law firm representing one of the parties. As this Court has stated, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

28 U.S.C. § 455 (a) provides that:

> Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (Emphasis supplied).

28 U.S.C. § 455 (e) provides in pertinent part that:

> Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a *full disclosure on the record* of the basis for disqualification. (Emphasis supplied).

Petitioner asserts that Judge Merritt never disclosed such conflict until after the decision and then only after it was brought to his attention.

While Judge Merritt's order of May 9, 1997, recusing himself after the panel decision had been rendered, asserts that he disclosed his prior affiliation with Gullett, Sanford, Robinson & Martin to the parties to this appeal, the transcript of the oral argument does not support that contention. Judge Merritt never addressed the issue of a conflict of interest at

any time as substantiated by the record below. There is no mention that he was a former partner in the railroad's law firm nor that he was an active client of the firm.

The Sixth Circuit Court of Appeals, on which Judge Merritt sits, has held that 28 U.S.C. § 455 (a), quoted above, "is a self-executing provision for the disqualification of federal judges." *Roberts v. Bailar*, 625 F.2d 125,128 (6th Cir. 1980). The court further explained that Congress enacted section 455 "to promote public confidence in the impartiality of the federal judicial system..." *Id.* The statute creates an objective standard. "It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge." *Id.*

Judge Merritt had a mandatory duty to disclose his client relationship and prior partnership in the railroad's law firm. He failed to do so. Given his close association with that firm and the admission by Respondent's Counsel that he believed there were still open files of real estate transactions between Judge Merritt and Respondent's counsel, it was incumbent upon Judge Merritt to recuse himself prior to oral argument and decision. Recusal following a Petition for Rehearing wherein his conflict of interest was brought to light is ineffectual and addresses neither the public's right to expect the utmost impartiality in its judiciary, nor Petitioner's particular right to an impartial outcome in this appeal.

Public confidence in the integrity and impartiality of the federal judiciary is not served when a federal appellate judge does not follow the letter of a statute designed to prevent even the appearance of impropriety.[3] The Petitioner herein was not given the opportunity to waive the conflict as

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[3] One must also question the failure of Respondent's Counsel to bring the same to light in a timely fashion without the necessity of inquiry.

he was not made aware of it prior to oral argument. This was a substantial departure from the accepted and usual course of judicial proceedings. Sup. Ct. Rule 10. Judge Merritt participated in the decision-making process without disclosing the conflict either to the parties or to his fellow jurists. This departure requires the intervention of this Honorable Court to remedy the taint of impropriety that permeates the panel decision rendered in this case, and necessitates a new hearing before a different three judge panel.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. Petitioner further suggests that under the remarkable facts presented, that this Court is empowered to *sua sponte* strike the panel decision, reverse and remand for rehearing before an entirely new panel.

Respectfully submitted,

/s/_____
E. J. Leizerman
Counsel of Record

E. J. Leizerman & Associates
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Toledo, Ohio 43624
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Counsel for Petitioner

APPENDIX A

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 9, 1997
LEONARD GREEN, CLERK

WILLIAM HARMON, *Plaintiff-Appellant*,	)	
v.	)	**ORDER**
CSX TRANSPORTATION, INC., *Defendant-Appellee.*	)	

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be and it hereby is DENIED.

It is further ORDERED that the amended petition for rehearing with a suggestion for rehearing en banc not be accepted for filing.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, Clerk

APPENDIX B

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 9, 1997
LEONARD GREEN, CLERK

WILLIAM HARMON, *Plaintiff-Appellant*,	)	
v.	)	**ORDER**
CSX TRANSPORTATION, INC., *Defendant-Appellee.*	)	

Before: MERRITT, Circuit Judge

In light of the appellant Harmon's "Motion to Amend or Supplement Petition for Rehearing," the undersigned judge hereby recuses himself from further consideration of this case. I consider the "Motion" by Mr. E. J. Leizerman to be a request that I recuse myself which request I hereby grant.

At the time this case was heard earlier this year, I disclosed my previous relationship with the Gullett law firm. I was a member of that firm approximately 20 years ago. When I disclosed that previous relationship, Mr. Leizerman

advised that he did not make any request for recusal. Subsequent to the hearing and filing of the opinion in this case, Mr. Allen Lentz of the Gullett law firm handled a real estate matter for me. He drafted an Option Agreement in connection with a tract of land in Nashville which I am considering purchasing. His representation occurred subsequent to my concurrence in the decision written for the court by another judge of the panel.

I do not know personally the lawyer for the defendant. She became a lawyer at the Gullett firm long after I became a judge.

Now that Mr. Leizerman has chosen to make an issue of this matter, I therefore recuse myself from any and all further consideration of the case.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, Clerk

APPENDIX C

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 6, 1997
LEONARD GREEN, CLERK

WILLIAM HARMON,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
Middle District of Tennessee
Nashville Division

AMENDED PETITION FOR REHEARING
TO INCLUDE SUGGESTION FOR REHEARING
EN BANC

E. J. Leizerman
E. J. Leizerman & Associates
717 Madison Avenue
Toledo, OH 43624
(419) 243-1010
(419) 243-8200 (fax)
Attorney for Plaintiff-
Appellant

Now comes appellant, William Harmon, and hereby amends his Petition for Rehearing filed on April 21, 1997 to include a suggestion for rehearing *en banc*. Counsel expressed a belief, based on his reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, to wit, is it improper for a member of a three judge panel, in this case Honorable Gilbert Merritt, to participate in the oral argument and decision of the appeal without recusing himself or divulging the fact that he had an active attorney-client relationship with the law firm representing the appellee, as evidenced by the post-decision correspondence between counsel which is attached hereto and made a part hereof.

Respectfully submitted,

/s/_____
E. J. Leizerman
E. J. Leizerman &
Associates
Attorney for Appellant

CERTIFICATION

This is to certify that a copy of the foregoing was sent via Ordinary United States Mail to the following:

Wayne L. Robbins, Jr., Esq.
Gullett, Sanford, Robinson & Martin
230 Fourth Avenue North, 3rd Floor
Post Office Box 198888
Nashville, TN 37219-8888

this 5th day of May, 1997.

/s/_____
E.J. Leizerman
Attorney for Appellant

Law Offices
GULLETT, SANFORD, ROBINSON & MARTIN, PLLC

April 22, 1997

E.J. Leizerman
E.J. Leizerman & Associates
717 Madison Avenue
Toledo, OH 43624

Re: *William Harmon v. CSX Transportation*

Dear E.J.:

I am in receipt of your April 17 letter. There was no inference. At the time of our Sixth Circuit argument in the case of *Wison v. CSX*, Judge Merritt disclosed in open court that he was a former partner and current client of my law firm, and he offered to recuse himself. You declined the offer. Subsequent to that argument, you and I discussed the matter, specifically with regard to my firm's representation of Judge Merritt. You and I agreed that there was no recourse to be taken by either party.

My firm in not representing Judge Merritt with regard to any trust matters right now, although I understand that he has one open property transaction file with my partner Allen Lentz. As you well know, Judge Merritt is a former partner in this law firm, although he and I were never in the firm at the same time.

Should you have any further questions about this matter, please let me know.

Sincerely,

/s/_____
Lyn Robbins

WLR:ckh
cc: Mr. J. Lynn Stollings
Mr. Jim Nodler
Allen D. Lentz, Esq.

E.J. LEIZERMAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS AT LAW

April 25, 1997

Wayne L. Robbins, Jr., Esq.
Gullett, Sanford, Robinson & Martin
230 Fourth Avenue North, 3rd Floor
Post Office Box 198888
Nashville, TN 37219-8888

Re: *William Harmon v. CSX Transportation*

Dear Lyn:

Having received your letter under the date of April 22, 1997, there is a very clear and definite difference of recollection as to what took place at the Sixth Circuit argument in the case of *Wilson v. CSX*. Yes, Judge Merritt disclosed in open court during my argument, that he previously practiced law with your firm and he did offer to recuse himself. He never indicated that he was, or continued to be, a **client** of your firm. I declined his offer to recuse himself because of the spontaneity of the disclosure, as well as the disclosure simply being limited to a past history of being an attorney with your firm. Had he told me that he was a client of your firm, I would **not** have declined the offer of recusal.

Further, both you and Judge Merritt had an obligation to inform me clearly and forthrightly that your firm actually **represented** him and that he continued to be a client of your firm. When you implied that members of your firm

may have represented him, it was not definite and it was said in passing. It was also **after** the *Wilson* decision and accordingly, there was no recourse to be taken.

It should be equally clear that if Judge Merritt's only association with your law firm is one of being a past partner with the firm, I would have continued to waive any objection. But, your letter under the date of April 22, 1997 is the first time that you have ever indicated to me that Judge Merritt was not only **a client**, but continues to be. This should have been told to Mr. Harmon or his counsel prior to Judge Merritt participating in Mr. Harmon's appeal.

Irrespective of what transpired in *Wilson* two years ago, if there was an attorney-client relationship between your office and Judge Merritt during the *Harmon* appeal, the same had to be disclosed.

When I did not receive a reply to my letter of April 17, 1997, I filed a Motion to Amend or Supplement Petition for Rehearing. A copy of which you should already have received. Having subsequently received your letter of April 22, 1997, I have undertaken the responsibility of forwarding both that letter and this letter to the Sixth Circuit.

Very truly yours,

/s/_____
E.J. Leizerman

ELJ:tmj

APPENDIX D

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
April 25, 1997
LEONARD GREEN, CLERK

WILLIAM HARMON,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
Middle District of Tennessee
Nashville Division

MOTION TO AMEND OR SUPPLEMENT PETITION FOR REHEARING

E.J. Leizerman
E.J. Leizerman & Associates
717 Madison Avenue
Toledo, OH 43624
(419) 243-1010
(419) 243-8200 (fax)
Attorney for Plaintiff-
Appellant

Counsel for appellant represents to the court that attorney Wayne L. Robbins, Jr., counsel for appellee, suggested recently that appellee's law firm of Gullett, Sanford, Robinson & Martin had in the past and may presently represent the Honorable Gilbert Merritt. This statement was not particularly definite. As a result of both that statement and the panel decision rendered in this case, Judge Merritt being a member of the panel, I requested clarification from Mr. Robbins on the matter by way of letter under the date of April 17, 1997, (a copy of which is attached hereto). Mr. Robbins has not addressed the letter in any fashion, and accordingly, by way of this motion, Appellant, William Harmon requests that Judge Gilbert Merritt clarify the matter.

Counsel for Appellant Harmon is aware that Judge Merritt has openly acknowledged that at one time Judge Merritt was a member of the firm of Gullett, Sanford, Robinson & Martin. Counsel for Appellant Harmon has and continues to openly waive any issue pertaining to an appearance of impartiality or a conflict of interest arising solely out of Judge Merritt's prior employment relating with Gullett, Sanford, Robinson & Martin. But if that law firm has actually represented Judge Merritt or members of his immediate family, Counsel for Appellant Harmon would find this to be significantly different, and to be a conflict that neither appellant, nor his counsel, have waived or would waive.

If, in fact, Judge Merritt confirms that there has been a history of such representation by Gullett, Sanford, Robinson & Martin, or attorneys associated with that firm, for either himself or members of his immediate family, Counsel for Appellant Harmon would respectfully request that the panel decision be vacated and that the appeal be re-argued before an entirely different panel.

Respectfully submitted,

/s/ _____
E. J. Leizerman

CERTIFICATION

This is to certify that a copy of the foregoing was sent via Ordinary United States Mail to the following:

Wayne L. Robbins, Jr., Esq.
Gullett, Sanford, Robinson & Martin
230 Fourth Avenue North, 3rd Floor
Post Office Box 198888
Nashville, TN 37219-8888

this 24th day of April, 1997.

/s/_____
E. J. Leizerman
Attorney for Appellant

E.J. LEIZERMAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS AT LAW

April 17, 1997 VIA FACSIMILE and U.S. Mail

Wayne L. Robbins, Jr., Esq.
Gullett, Sanford, Robinson & Martin
230 Fourth Avenue North, 3rd Floor
Post Office Box 198888
Nashville, TN 37219-8888

Re: ***William Harmon v. CSX Transportation***

Dear Lyn:

Sometime ago you inferred to me that your firm possibly was, or currently is, representing Judge Gilbert Merritt with regard to trust and real estate matters. I would ask that your firm clarify this for me.

Please feel free to call me, if you so choose, to discuss this matter more fully.

Very truly yours,

/s/ _____
E. J. Leizerman

EJL:tmj

APPENDIX E

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
April 21, 1997
LEONARD GREEN, CLERK

WILLIAM HARMON,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
Middle District of Tennessee
Nashville Division

PETITION FOR REHEARING

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Attorney for Plaintiff-
Appellant

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PETITION FOR REHEARING

Pursuant to Rule 40, Federal Rules of Appellate Procedure, and Chapter 20.2 of the Internal Operating Procedure of the Sixth Circuit court of Appeals, William Harmon, Plaintiff-Appellant, respectfully requests rehearing to call to the attention of the court an erroneous application of law found at Page 8 of the panel opinion, wherein the court concluded that Harmon had notice of the district court's intent to dismiss his complaint when the defendant filed a motion to dismiss. However, the district court never gave plaintiff notice that dismissal was contemplated. The filing of a Motion to Dismiss by the opposing party is not a substitute for notice by the court. *Harris v. Callwood*, 844 F.2d 1254 (6th Cir. 1988). The decision of the panel holding that service of a Motion to Dismiss satisfied the notice requirement is inconsistent with *Harris* and effectively changes the law in this Circuit.

ARGUMENT IN SUPPORT OF PETITION

The order compelling plaintiff to "fully and completely" respond to the discovery at issue in defendant's motion to compel is found as part of a Revised Case Management Order entered on November 11, 1995. (R.11;

J.A. p. 51[1] Nowhere in that five page order is there an indication from the district court that failure to comply would or could result in dismissal.

On Page 8 of the Slip Opinion in this case, the court concludes that "there can be no argument that Harmon was without notice that the district court was contemplating the dismissal of his complaint. CSXT had filed a motion to dismiss . . ." This statement, which allows a motion to dismiss to serve as a notice directly from the court, runs counter to prior decisions of this court. In *Harris v. Callwood*, 844 F.2d 1254 (6th Cir. 1988), the case had been on the docket for four years, plaintiff had failed to appear at two pretrial conferences, and the case had once been dismissed and reinstated. Notwithstanding such conduct, this court reversed stating:

> [W]e have frequently reversed district courts for dismissing cases because litigants failed to appear or to comply with pretrial orders when **the district courts did not** put the derelict parties on notice that **further noncompliance** would result in dismissal.

Id. At 1256 (emphasis supplied).

In *Vinci v. Consolidated Rail Corp.*, 927 F.2d 287 (6th

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[1] Although not part of the record, counsel for Harmon would be remiss in not indicating to the court that the answers to interrogatories which defendant complains of were precisely the same answers which defendant had given in responses to plaintiff's similar interrogatories.

Cir. 1991), the complaint was dismissed for failure to file a Pretrial Statement, which was apparently the responsibility of plaintiff's counsel to prepare. The defendant attempted to justify the dismissal by referring to the trial court's standing order, which included an admonition that failure to attend a pretrial or comply with the standing order may result in dismissal or other sanctions. This court reversed the dismissal, holding that the "warning" contained in the standing order was **not**:

> . . . the kind of warning we envisioned in Harris when we spoke of notice that '<u>further</u> non-compliance would result in dismissal.'

Id. at 288 (emphasis in original).

In light of *Harris* and *Vinci*, it is apparent that this court has heretofore ascribed to the view that a fact specific warning **directly by the district judge** to the affected party is necessary to satisfy the warning requirement announced in *Harris*. Further, in numerous unreported decisions decided subsequent to *Harris* and *Vinci*, various panels of this court have concluded that where a party was not warned that his failure to file a pleading or otherwise comply with an order could result in dismissal, the "lack of a pre-dismissal warning is **pivotal** to the determination of willfulness." *Lovejoy v. Owens,* 19 F.3d 1433 (6th Cir. 1994) (Table) (unreported) (Addendum A). *See also, Goddard v. Larsen,* 12 F.3d 212 (6th Cir. 1993)(Table)(unreported)(Addendum B); *Zona v. Lincoln Homes, Inc.,* 963 F.2d 374 (6th Cir. 1992)(Table) (unreported)(Addendum C).

In the case at bar, **there was absolutely no warning of any kind, let along a fact specific warning,** in the

Revised Case Management Order or in any other order of the district court. A motion to dismiss should not, under the authorities cited above, serve as the warning that this court has **repeatedly held** must emate from the court itself.

The panel decision herein therefore has "overlooked or misapprehended" prior decisions of this court. Indeed, the decision effectively overrules or supercedes that portion of *Harris* which mandates that **prior notice of** an intent to dismiss must come from the **trial court.** By removing this requirement, the panel decision dramatically changes the law that has existed in this circuit and has replaced it with a new standard of trial court discretion that is vague, unworkable and which provides no guidance to the bench and bar in future cases as to whether notice will hereafter be required and what the nature of that notice must be.

It is submitted that the new standard announced herein will likely result in an increased number of appeals.[2] Rehearing should be granted to rectify this mistake and to allow plaintiff William Harmon to have his claim decided on the merits, notwithstanding his counsel's conduct.

CONCLUSION

A motion to dismiss filed by one party cannot form the basis of the requirement that notice be given directly by the court before dismissal is granted. Where, as here, no notice

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[2] Plaintiff trusts that if the standard announced herein is adopted, corporate defendants who violate similar discovery orders, will be subject to default judgment without prior notice by the district court.

is given by the trial court, it is an abuse of discretion to dismiss a complaint for failure to prosecute where the fault is that of counsel and not the litigant.

WHEREFORE, plaintiff-appellant William Harmon respectfully prays that his Petition for Rehearing be granted and that on rehearing this court reverse the judgment of the district court.

Respectfully submitted,

/s/_____
E. J. Leizerman
Attorney for Plaintiff-
Appellant, William Harmon

CERTIFICATION

THIS IS TO CERTIFY THAT A COPY OF THE FOREGOING WAS SENT VIA ORDINARY U.S. MAIL TO THE FOLLOWING:

Wayne L. Robbins, Jr., Esq.
Gullett, Sanford, Robinson & Martin
230 Fourth Avenue North, 2nd Floor
Nashville, TN 37203

this 18th day of April, 1997.

/s/ _____
E. J. Leizerman
Attorney for Plaintiff-
Appellant, William Harmon

APPENDIX F

No. 96-5207

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

William Harmon, Plaintiff-Appellant,	)	
v.	)	On Appeal from the United States District
CSX Transportation, Inc., Defendant-Appellee.	)	Court for the Middle District of Tennessee

Decided and Filed April 7, 1997

Before: MERRITT, RYAN, and SUHRHEINRICH, Circuit Judges.

RYAN, Circuit Judge. William Harmon filed this action against CSX Transportation, Inc., pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51, et seq. The district court dismissed Harmon s complaint for failure to prosecute and to comply with an order of the court. Finding

no abuse of discretion, we affirm.

I.

On December 12, 1994, Harmon filed this FELA action seeking damages for an abdominal injury allegedly caused by CSXT's negligence. CSXT answered the complaint and served Harmon with written discovery requests on February 1, 1995.

On April 18, 1995, Harmon submitted answers to CSXT's discovery requests. There is no doubt that Harmon s answers were inadequate and improper. For example, in response to CSXT's request for all documents prepared by any government agency regarding unsafe work conditions at CSXT, Harmon objected that such documents were attorney work product and/or gathered in anticipation of litigation, and furthermore, that the request was vague, overbroad, burdensome and oppressive. Similarly, in response to CSXT s request for any documents which might indicate that CSXT failed to provide a safe working environment, Harmon objected that this request is vague and confusing.

On April 20, 1995, CSXT mailed a letter to Harmon s attorney requesting supplementation of Harmon s April 18 responses. The letter stated that it was a good faith attempt to resolve a discovery dispute and made clear to what additional information CSXT believed it was entitled. CSXT requested additional information with regard to all ten of its initial requests for production and with regard to six of 17 initial interrogatories.

On May 10, 1995, CSXT mailed a letter to Harmon's attorney to document its attempt to schedule depositions in compliance with the original pretrial order. CSXT also noted that it had "received no response...concerning [its] correspondence of April 20" and that it would "have no choice but to file a Motion to Compel" if it was not contacted by May 26, 1995. On May 25, 1995, Harmon's counsel apologized for the delay and requested an extension, until June 2, 1995, to respond to CSXT's request for supplementation. CSXT responded that the extension was "perfectly acceptable." On June 16, 1995, however, having heard nothing further from Harmon, CSXT notified Harmon's counsel that it intended to file a motion to compel on the following Monday, unless it "hear[d] from [Harmon] otherwise." Harmon did not respond to CSXT's June 16 letter.

On June 21, 1995, CSXT filed a motion to compel discovery. CSXT submitted the foregoing correspondence as evidence that it "attempted to confer with counsel for the Plaintiff in a good faith effort to resolve" the discovery dispute. Harmon did not respond to the motion to compel and he did not provide the requested discovery. On November 2, 1995, the district court entered a revised case management order which, *inter alia,* noted Harmon's failure to respond, granted CSXT's motion to compel, and ordered Harmon to "fully and completely respond to the discovery at issue in that Motion on or before November 10, 1995." Harmon did not comply with this order.

Accordingly, on November 22, 1995, twelve days

after the deadline established by the court's order, CSXT filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 37(b)(2), 37(d), and 41(b). CSXT also requested that the court award it costs and attorney fees. On December 5, 1995, Harmon requested an extension, until December 18, 1995, to respond to the motion to dismiss. The district court granted Harmon's request, but Harmon did not file a response on or before December 18, 1995. In fact, Harmon still had not responded when, on January 5, 1996, eighteen days after the extended deadline, the district court dismissed his case with prejudice "for failure to comply with the order of the Court and failure to prosecute."

On January 11, 1996, Harmon filed a motion for relief pursuant to Federal Rule of Civil Procedure 60(b). In a memorandum in support of the motion, Harmon's counsel explained that

> [w]hen counsel for plaintiff received the court's order compelling discovery, he and his legal assistant began collecting the information sought by defendant.
>
> Supplemental answers to defendant's discovery were prepared. Unfortunately, Tracy Joyner, counsel's legal assistant became ill during the middle of December, 1995 and was out of the office sporadically between then and January 8, 1996, when she returned again, full time. . .Ms. Joyner believed that the supplemental responses had been served on the defendant during her absence and it was not until

> counsel received the court's order that it was discovered that this was not the case.
>
> . . .Plaintiff has in fact now served his supplemental responses on defendant in the hopes that the court will reconsider its order.
>
> Counsel candidly concedes that a mistake has been made and assumes full responsibility. However, that mistake should not inure to the detriment of the plaintiff who is blameless.

On January 31, 1996, the district court reconsidered the course of discovery in the case and denied Harmon's Rule 60(b) motion. The district court concluded simply that Harmon's "neglect is inexcusable." On February 12, 1996, Harmon filed a notice of appeal.

II.

A.

The burden of the plaintiff's argument is that his attorney's nonfeasance cannot be denied and that he is sorry for it, but that dismissal is an unfair and excessive sanction to visit upon the client for the sins of his attorney.

Subsection (b)(2) of Federal Rule of Civil Procedure 37 provides that

> [i]f a party . . .fails to obey an order to provide or permit discovery, . . .the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> © An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Federal Rule of Civil Procedure 41(b) provides, in part, that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action."

We review a district court's decision to invoke discovery sanctions for an abuse of discretion. *Regional Refuse Sys., Inc. V. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988). In assessing a district court's decision to dismiss a complaint, we consider four factors in particular: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) "whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery"; (3) "whether the dismissed party was warned that failure to cooperate could lead to dismissal"; and (4) "whether less drastic sanctions were imposed or considered before dismissal was ordered." *Id.* at 153-55.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), the Supreme Court affirmed a district court's decision to dismiss a complaint for failure to prosecute. The district

court had dismissed the case, *sua sponte,* without notice or hearing, after the plaintiff's attorney failed to appear at a scheduled pretrial conference. *Id.* At 628-29. The plaintiff's attorney had previously waited 19 months to respond to the defendant's initial interrogatories, had answered those interrogatories only after being threatened with dismissal, and had responded to further interrogatories only after requesting an extension of time. *Id.* At 634 n.11. Although the case was six years old at the time of dismissal, the first three years were consumed by the plaintiff's successful challenge to the defendant's motion to dismiss, and, in the fifth year, a trial date was vacated at the defendant's request. *Id.* At 628 n.2.

The Supreme Court concluded that the district court had not abused its discretion when it dismissed the plaintiff's complaint. *Id.* at 633. The Court explained that "it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation. . . ., that petitioner had been deliberately proceeding in dilatory fashion." *Id.* As to the argument that punishment for the sins of the lawyer should not be visited upon the client, the Supreme Court said that

> [t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.

Id. At 633-34. The Court concluded that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." *Id.* At 634.

Notwithstanding *Link*, "this court, like many others, has been extremely reluctant to uphold the dismissal of a case. . .merely to discipline an errant attorney because such a sanction deprives the client of his day in court," *Buck v. U.S. Dep't of Agric., Farmers Home Admin.*, 960F.2d 603, 608 (6th Cir. 1992), and it has stated that "[d]ismissal is *usually* inappropriate where the neglect is solely the fault of the attorney," *Carter v. City of Memphis,* 636 F.2d 159, 161 (6th Cir. 1980)(*per curiam*)(emphasis added). More recently, this court noted that "although the *Link* principle remains valid, *see National Hockey League v. Metro[politan Hockey Club, Inc.*, 427 U.S. 639 (1976)], we have increasingly emphasized directly sanctioning the delinquent lawyer rather than an innocent client." *Coleman v. American Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1993).

Accordingly, the *Regional Refuse* factors, set forth above, have been applied more stringently in cases where the plaintiff's attorney's conduct is responsible for the dismissal. With regard to the first factor, this court has stated that "dismissal of an action for an attorney's failure to comply" should only be ordered where there is "'a clear record of delay or contumacious conduct.'" *Carter,* 636 F.2d at 161 (citation omitted). Similarly, with regard to the third factor, the court has explained that where a plaintiff has not been given notice that dismissal is contemplated, "a district court

should impose a penalty short of dismissal unless the derelict party has engaged in 'bad faith or contumacious conduct." *Harris v. Callwood,* 844 F.2d 1254, 1256 (6th Cir. 1988) (citation omitted). Finally, with regard to the fourth factor, although it is clear that the failure of the district court to impose or make explicit its consideration of lesser sanctions is not fatal, *see Bank One of Cleveland, N.A. v Abbe,* 916 F.2d 1067, 1079 (6th Cir. 1990); *Regional Refuse,* 842 F.2d at 155, this court recently stated that, in the absence of such consideration, and "in the absence of contumacious conduct, an alternate sanction that would protect the integrity of pretrial procedures should be utilized rather than dismissal with prejudice," *Freeland v. Amigo,* 103 F.3d 1271, 1280 (6th Cir. 1997).

Clearly it is difficult to define the quantity or quality of the misconduct which may justify dismissal with prejudice as the first and only sanction. This difficulty is no doubt part of the reason that we review a district court's judgment in such cases only for an abuse of discretion. We note, however, that despite this court's reluctance to affirm the harsh sanction of dismissal in cases "where the neglect is solely the fault of the attorney," there should be no doubt that this court cannot require of a district court any greater forbearance than the Supreme Court required in *Link.* That is to say, that whatever this court's "clear record of delay or contumacious conduct" standard demands, it cannot demand that a district court endure greater neglect and insult than that which was sufficient to affirm the district court's exercise of its discretion in *Link.*

Mindful, then, of the *Regional Refuse* factors and the Supreme Court's decision in *Link,* we are satisfied that the district court did not abuse its discretion when it dismissed Harmon's complaint for failure to prosecute and to comply with an order of the court. The district court did not order dismissal until nearly a full year after CSXT served Harmon with its original discovery requests. Although this delay does not rival the delay attributed to the plaintiff in *Link,*, Harmon's intransigence was equally, it not more, egregious because it was accomplished with disregard for CSXT's persistent requests and with contempt for an order of the court. By way of contract, in *Link,* "there [was] no indication in the record that the defendant tried to get the interrogatories answered earlier." *Link,* 370 U.S. at 640 (Black, J., dissenting).

Harmon failed to respond to the amicable requests of CSXT's counsel, he failed to respond to CSXT's motion to compel, and he failed to comply with the district court's November 2, 1995, order. To make matters worse, Harmon then failed to respond to the motion to dismiss, even after the district court was gracious enough to grant him an extension of time. This record is more than adequate to establish that Harmon's counsel was stubbornly disobedient and willfully contemptuous. It is, in short, a clear record of delay and contumacious conduct.

We have no doubt that CSXT was prejudiced by Harmon's failure to respond to its interrogatories. Not only had CSXT been unable to secure the information requested, but it was also required to waste time, money, and effort in

pursuit of cooperation which Harmon was legally obligated to provide. Furthermore, there can be no argument that Harmon was without notice that the district court was contemplating the dismissal of his complaint. CSXT had filed a motion to dismiss and Harmon had requested additional time to respond.

We recognize that the district court did not articulate its consideration of lesser sanctions. As we have noted, this shortcoming, if indeed it is one, is not necessarily fatal.

That is to say, the district court's consideration or imposition of lesser sanctions is a *factor* in our review, not a *sine qua non* for affirmance. We have never held that a district court is without power to dismiss a complaint, as the first and only sanction, solely on the basis of the plaintiff's counsel's neglect, *see, e.g., Buck,* 960 F.2d 377, 378-79 (6th Cir. 1986)(*per curiam*), and, indeed, any such rule would conflict with *Link* and the plain language of Federal Rule of Civil Procedure 37(b)(2). We are loathe to require the district court to incant a litany of the available lesser sanctions. Concomitantly, we do not assume that lesser sanctions were not considered simply because their consideration is not articulated.

Rather, we understand this factor to require particular caution "in the absence of contumacious conduct." *Freeland,* 103 F.3d at 1280. This caution is required because, where the district court has not manifested consideration of less drastic sanctions, it is more difficult, although not impossible, for this court to conclude that the district court exercised its discretion with appropriate forethought. We indulge the general assumption, however, that federal district judges

apply both the law and common sense.

Presented with a record of sufficiently egregious conduct, then, this court need not hesitate to conclude that a district court has not abused its discretion by ordering dismissal as the first and only sanction. We are satisfied that the record in this case documents conduct sufficiently egregious to support the district court's exercise of its discretion, in spite of its failure to expressly consider lesser sanctions.

The line of cases following this court's in *Carter* is distinguishable. We note, for example: in *Freeland,* 103 F.3d at 1278, this court found that the plaintiff's attorney's conduct was not contumacious, that the defendant's "attorneys also engaged in dilatory conduct," and that the plaintiff was not adequately warned of the possibility of dismissal; in *Little v. Yeutter*, 984 F.2d 160, 163 (6th Cir. 1992), this court found "no evidence which shows that [the plaintiff] failed to adhere to any pre-trial orders"; in *Vinci v. Consolidated Rail Corporation,* 927 F.2d 287, 288 (6th Cir. 1991), this court found that the plaintiff had not been given a meaningful warning that dismissal was contemplated and that defendant had not been prejudiced; in *Patterson v. Township of Grand Blanc,* 760 F.2d 686, 688 (6th Cir. 1985)(emphasis added), this court concluded that "lack of compliance with all of [the district court's] orders *within five days* falls short of establishing a basis for final dismissal"; and in *Carter,* 636 F.2d at 161, there was no finding of prejudice to the defendant who had been "equally dilatory." None of these factors, critical to these decisions, is present in this case.

For all of the foregoing reasons, then, we conclude that the district court did not abuse its discretion when it dismissed Harmon's complaint.

B.

Harmon's initial brief to this court focused exclusively on his belief that the district court abused its discretion when it dismissed his complaint. In his reply brief, apparently taking his cue from CSXT's brief, Harmon argues additionally that the district court abused its discretion when it denied his Rule 60(b) motion for a relief. Assignments of error "raised for the first time in a reply brief are not properly before this court." *United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993).

Even if this assignment of error were properly before this court, it would fail. Harmon himself characterizes his motion for relief as an "explanation, not [an] excuse." We agree with this characterization. Harmon's explanation, even were it to be fully credited, is not capable of establishing that the conduct which prompted the district court to dismiss his complaint was excusable. *See generally Buck*, 960 F.2d 603.

III.

The judgment of the district court is **AFFIRMED.**

APPENDIX G

No. 3:94-1094

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
January 31, 1996
MCKESSER, CLERK

WILLIAM HARMON,	)	
	)	
v.	)	**ORDER**
	)	
CSX TRANSPORTATION, INC.,	)	

Before the Court is the motion of plaintiff for relief under Rule 60(b) of the Federal Rules of Civil Procedure from an order dismissing the case for failure to prosecute and failure to obey the order of the Court.

After a series of correspondence was unavailing in obtaining discovery from plaintiff, defendant filed a motion to compel on June 21, 1995. Plaintiff never responded to the actions. Magistrate Judge Haynes entered a revised case

management order on November 2, 1995, in which he granted defendant's motion to compel and ordered plaintiff to fully and completely respond to discovery at issue in the motion by November 10, 1995. When plaintiff again failed to comply, this time to an order of the Court, defendant filed a motion to dismiss the action with prejudice. To this motion, plaintiff filed a motion for extension of time to respond until December 18, 1995. This motion was granted. Plaintiff never responded to the motion to dismiss. On January 5, 1996, the Court granted the motion to dismiss with prejudice.

Plaintiff cites excusable neglect as a basis for Rule 60(b) relief. However, his neglect is inexcusable.

The motion for relief is **DENIED**.

It is so **ORDERED.**

/s/_____
Thomas A. Wiseman, Jr.
Senior U.S. District Judge

APPENDIX H

No. 3:94-1094

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
January 5, 1996
MCKESSER, CLERK

WILLIAM HARMON,	)	
	)	
v.	)	**ORDER**
	)	
CSX TRANSPORTATION, INC.,	)	

In this case, the defendant filed a motion to dismiss on November 22, 1995, based upon the plaintiff's failure to respond to discovery. This motion was based also upon a previous order of the Court entered November 2, 1995, in which the Court granted a motion to compel and ordered the plaintiff to fully and completely respond to discovery before November 10, 1995. The plaintiff filed a motion on December 5, 1995, requesting an extension of time until December 18, 1995, to respond to the motion to dismiss.

This motion was granted by the Court. However, the plaintiff has still failed to respond to the motion to dismiss.

This case is therefore dismissed for failure to comply with the order of the Court and failure to prosecute.

It is so **ORDERED.**

/s/ _____
Thomas A. Wiseman, Jr.
Senior District Judge

APPENDIX I

No. 96-5207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HARMON,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

TRANSCRIPT OF ORAL ARGUMENT
JULY 25, 1997

MR. LEIZERMAN: Good morning. My name is E.J. Leizerman. I will be arguing on behalf of the Appellant. I wish to argue for approximately 10 minutes, reserving approximately five.

I am also the attorney at issue in this case.

JUDGE MERRITT: You may.

MR. LEIZERMAN: I believe it is undisputed that the standard of review in this case is that of abuse of discretion. I believe there are two issues in that regard.

The first is, was it an abuse of discretion in dismissing this case with prejudice, and the second, was there abuse of discretion in denying Plaintiff's Motion from Relief from that Order under the Motion under Rule 60-B.

In addressing the first issue, I would like to indicate that over the years this Court has announced and reiterated at least five clear and specific factors which a District Court must consider before dismissing a case with prejudice.

One is whether the claim is vexatious or fictitious. Two, whether it is Plaintiff's responsibility or the client himself is responsible for any delay. Three, whether lesser sanctions were available. Four, whether there is any real prejudice to the Defendant. And five, whether the delay indicated a pattern of dilatory conduct or an indication that the Plaintiff did not intend to prosecute the action.

With respect to the matter ever so briefly, the case is simple. It's an FELA case and the Plaintiff contended he was negligently injured by his employer. He sustained a ruptured abdominal hernia which was surgically repaired.

JUDGE RYAN: If it was as simple as you say, why wasn't this -- I mean, I read this time and time again, people are saying get it in, get it in, get it in.

MR. LEIZERMAN: Your Honor, over the years we primarily dealt in FELA cases and I was trapped in a sense,

well, I erred here. I share half the responsibility. I thought we had done this case in pretty quick time. This case was filed --

JUDGE RYAN: Well what do you think these orders and letters to you were? Just nothing that you had to be concerned about?

MR. LEIZERMAN: No. We thought we had cured them. After the Motion to Compel had taken place, we then proceeded to take the deposition of the Plaintiff himself. In those four Interrogatories which he had filed a Motion to Supplement, those four Interrogatories were all answered under oath after his motion was pending in his deposition.

JUDGE RYAN: But you got an order after that saying to put it in answer form.

MR. LEIZERMAN: In November I got that order and that's where I tripped up. I tripped up on one issue and I tripped up twice on the same issue. And I have no justification before this Court as to why I didn't respond, other than what is not in the record is an ongoing series of telephone calls between their office and mine. And I truly believe that the information had been rendered.

And when the Court looks at the nature of those specific Interrogatories, those four Interrogatories and the Request for Production, the Court can see and match his deposition, he had answered those. Virtually all of them were

answered on Page 34 and 35.

JUDGE SUHRHEINRICH: The original Interrogatories?

MR. LEIZERMAN: The motion -- yes, there was not a Motion to Compel the original Interrogatories, there was a dissatisfaction with the original Interrogatories.

JUDGE RYAN: With every single one of the questions, or answers rather. Is that not right?

MR. LEIZERMAN: No, I --

JUDGE RYAN: Wasn't there 17 of them?

MR. LEIZERMAN: I don't believe so, no. I may be wrong.

JUDGE RYAN: Well, I looked at some of the answers and they weren't very helpful.

MR. LEIZERMAN: We simply in the end when we did answer them, we simply didn't have anything to ask OSHA about these. We never have. And in the end we told them to this day we don't have any OSHA documents, we have no knowledge of his OSHA documents.

The medical records were all voluntarily, every record.

JUDGE SUHRHEINRICH: Did you plead some violation of OSHA's documents?

MR. LEIZERMAN: Apparently. We had to.

JUDGE SUHRHEINRICH: You know, you say this is a simple case and you didn't do anything wrong. We ask you specific questions about your case and it's apparently, I don't remember. I mean --

MR. LEIZERMAN: I did have specific -- you're talking about OSHA. We have no OSHA documents whatsoever. We have never been provided with any OSHA documents to ask us for a theory of negligence, and whether it pertained to OSHA. We have no theory of negligence as to whether it pertained to OSHA. Our theory of negligence --

JUDGE RYAN: Well that isn't what you said in respect -- pardon me for interrupting here. You know, we've got a lot of cases today. Interrogatory No. 1 asks for federal and state income tax records. Your client's answer was he was not in the possession of that information.

MR. LEIZERMAN: If I may --

JUDGE RYAN: Question No. 4 asks for all the OSHA documents Judge Suhrheinrich spoke of, or any other governmental agency.

The answer was not we don't have them, the answer

was that he objected on the grounds that they were attorney work product or gathered in at this station of litigation.

No. 6 requested all the documents or things which indicate the railroad failed to provide a reasonably safe work place. Harmon's answer was that's vague and confusing.

Now when this lawyer or lawyers for the other side ask for supplementation for six of the 17 Interrogatories, that was a request pretty well taken, wasn't it, in view of those kinds of answers?

MR. LEIZERMAN: Yes. And the record should indicate with regard to IRS we did not have them, but we filed, we submitted an authorization for them to obtain them if they wanted them. He did state under oath in his deposition that his only employment over the last 30 years was the railroad.

JUDGE RYAN: You never supplied the supplementation they asked for, is that correct?

MR. LEIZERMAN: I believe we did our best efforts to, your Honor.

JUDGE RYAN: Is the answer yes, we did not supply the supplemental information, or is it that we supplied --

MR. LEIZERMAN: We did supply everything that

was in our possession. We supplied everything we had possession of.

JUDGE MERRITT: Let me ask you a question, Counsel. The only thing that troubles me about this case is that your client may have a good FELA case despite all of your negligence. And that perhaps a sanction of some kind that is not dismissal of your client's case would be better.

Now the only sanction I can think of is for you, the culpable party, to pay the costs to Counsel or to the Plaintiff -- or to the Defendant, for the additional time that you caused the Defendant to have to pay for, and Counsel and other fees, including the cost of this appeal. Because all of that is directly the result of your negligence. Nothing other than that.

MR. LEIZERMAN: I agree. I agree, Your Honor.

JUDGE SUHRHEINRICH: Is that a sufficient punishment though, that I can disregard the Court's orders, disregard what's happening and I'll pay some fee? I come up here and then I start all over again?

MR. LEIZERMAN: Your Honor, we were wrong.

JUDGE SUHRHEINRICH: Should we fine more than -- should there be something more than just costs assessed to Jim?

MR. LEIZERMAN: I think there should be something less than dismissal with prejudice. My error should not be visited.

JUDGE RYAN: Why?

MR. LEIZERMAN: Your Honor --

JUDGE RYAN: Because you wouldn't do it and Judge Wiseman would, or what?

MR. LEIZERMAN: I don't think my wrong should be visited on behalf of Mr. Harmon.

JUDGE RYAN: Does the Supreme Court of the United States agree with you about that; the Link Case?

MR. LEIZERMAN: With regard to Link, I think one of the better reasoned opinions and addresses of that was actually your's in Coleman.

JUDGE RYAN: In Regional Refuse?

MR. LEIZERMAN: In American Red Cross. And if I may quote your Honor --

JUDGE RYAN: You can always quote me, even when it isn't applicable.

MR. LEIZERMAN: You said undoubtedly there are cases although they ought to be few, in which contumacious conduct of the lawyer should not be attributed to the client. And you went on in that paragraph to cite by way of example, and you said or were aware that culpable neglect and contrary to the client's interest, Counsel fails to advance the client's cause through discovery and pretrial procedures, and other such circumstances where Counsel's misconduct is entirely personal and in no way significantly advances or advantages this client's case. I was wrong.

JUDGE RYAN: Unfortunately I've gotten old now and I have no chance of being on the United States Supreme Court. So what I say has nothing to do with what the law is. Link is the law, isn't it?

MR. LEIZERMAN: Yes. This Court over a long period of cases has indicated its decisions that the wrongs of Counsel should not be visited upon the --

JUDGE RYAN: But that's a matter of discretion, isn't it? If the Supreme Court said explicitly as it did in Link, that that argument carries no legal weight. I don't -- unless you disagree with what Link says. I read Link as saying explicitly that the argument that you can't visit the sins of the lawyer on the client under the Rule simply is not a proper application of the Rule. There is no merit in the contention the Supreme Court should.

You're arguing, it seems to me, as is certainly you're

entitled to argue, that Judge Wiseman abused his discretion in the severity of the sanction. And I'm interested to hear you offer some rationale on the law of abuse of discretion because I don't think you can offer any law that says it's illegal to dismiss in view of Link. Maybe I'm wrong. Go ahead.

MR. LEIZERMAN: Well, in Link the Supreme Court expressly left open the question of whether denial of a 60(b) motion which was not made in that case would be an abuse of discretion. Having expressly left that portion of it open, this Court has indicated over the years that it can be an abuse of discretion and that the cases must be looked at individually.

And while I can see, very, very frankly can see we erred, we did a lot of work on this case. It was not an act of contemnacious conduct. It was not an act of defiance. I traveled from Detroit to Nashville on at least three occasions on this case. When you look at how much work has been done, Magistrate's advised pretrial order in November of that year right before dismissal, and less than a year old, this case was less than a year old, based upon the representations of both Counsel the Court felt the case, because of what we told them we had accomplished, was right for trial at the earliest available date we had in November, which was the spring or summer of '96.

I think he recognized based upon our representations that we had done a lot of work. And as Judge Merritt suggested, I'm not faultless here. And I think I should have been required to pay costs involved. But dismissal with

prejudice under the circumstances of this case I think was unreasonably harsh in light of the criteria that this Court has indicated in other such cases.

JUDGE MERRITT: All right, thank you, Counsel.

MR. ROBBINS: May it please the Court, I'm Lyn Robbins on behalf of Appellee CSX. I don't want to take a lot of time as the Court has discussed, this is a discretionary matter for Judge Wiseman. The Court is obviously aware of what happened.

Only a couple of facts and situations I want to make clear. When the discovery was first served, unverified responses which are in the record were served in April of 1995. They were followed with a series of correspondence between me and -- well, not really between me, from me to Mr. Leizerman, with one exception. And that was we did get a letter from Mr. Leizerman's paralegal saying give us a one-week extension, we'll get them to you. That's the only response to any of that correspondence, and of course that extension was not met.

The Motion to Compel was filed in June. No response to motion. Magistrate Judge Haines does not grant it until October, so there's an additional four months time that the Plaintiff could submit supplementation.

When the Order is filed by Magistrate Judge Haynes, he allows him to November 10, an additional three weeks to respond. There's no response to that Order. The Motion to Dismiss is filed. First factual point that I think is important

is that the Counsel for the Plaintiff, the Appellant here, filed a Motion with Judge Wiseman for an extension of time to respond to Motion to Dismiss.

JUDGE MERRITT: No question he had notice.

MR. ROBBINS: Which is the point, Your Honor. The cases cited by the Appellant such as Carter, such as Patterson, talked about as one of the critical reasons this Court overturned dismissals, hat it's not clear that Counsel had notice that the case could be dismissed for --

JUDGE MERRITT: The problem here as I see it, and you can correct me if I misread the cases, the question is whether or not whether there was notice, but rather whether there was contumacious conduct. And that becomes a question about whether gross negligence on the part of Counsel and dilatoriness is synonymous with contumacious conduct.

So what do you say to that?

MR. ROBBINS: Your Honor, I -- we both cited citations of the Court and sometimes the Court finds it is and it isn't. And I would find a definition of contemnacious conduct in those cases. I think that there -- the best evidence in this case of that is Judge Wiseman who is overseeing the case and had a second chance under Rule 60 motion to go back and determine what kind of neglect is involved here and concludes that it is inexcusable neglect based on his review of

what happened in the case.

JUDGE SUHRHEINRICH: But that's not the standard. He uses -- the standard is not one of excusable neglect. That is a standard in some other situations about whether you should reconsider, but he seems to use the standard of inexcusable neglect as the standard by which he's supposed to determine wether to dismiss this case, and that is not the standard. The standard is one of notice, contemnacious conduct, and whether they are alternate sanctions that should be imposed.

So it seems to me you used an erroneous standard here.

MR. ROBBINS: Well --

JUDGE SUHRHEINRICH: Isn't that right? The standard is not excusable neglect or inexcusable neglect in those kind of cases.

MR. ROBBINS: I understand what the Court is saying. I think the reason that he used that language is because the Rule 60 motion filed by the Plaintiff claimed excusable neglect, and I think Judge Wiseman is responding to that.

JUDGE MERRITT: And said no. That's true. He's right about that. It's not excusable neglect.

MR. ROBBINS: Now as to what constitutes contemnacious conduct, I can't find a definition in Sixth Circuit cases of that term, but I will say that failure to respond not to one motion, but to two, failure to respond to Motion to Compel and to Motion to Dismiss. And secondly, ignoring the Court's orders for months on end seems to me to fairly -- to be a fair discretionary call by the District Judge that that is contemnacious conduct.

Now I don't have a definition ready to read to the Court of what that term is and I think this Court's cases has shown that the Court doesn't really have one either. It's a case by case situation.

The other thing I wanted to point out to the Court other than the fact that the Motion for Extension of Time was granted is the Rule 60 motion. This Court in the Marietta case, which I've attached and the Westfall case which I've attached to my brief, has held that once the Rule 60 motion is heard and the Court has a second chance to review its discretion, that there just needs to be a definite and firm indication of abuse of discretion. It's not a smell test anymore. It's a, can we point to something in the record where Judge Wiseman definitely abused his discretion. And I'm not going to say this Court can't find that, but I think the facts in this case are sufficiently severe that it falls reasonably within the trial judge's discretion in reviewing his document to dismiss the case.

JUDGE SUHRHEINRICH: One other question. One

of the elements of the five is the seriousness of the case on the merits as I read the factors to be considered. What's your defense on the merits in this case?

MR. ROBBINS: Well, Your Honor, based on what we know at this point, this is a case where a man was asked to roll some rails out of a ditch and he claims to have gotten hurt.

JUDGE MERRITT: And he says it was unsafe conditions there?

MR. ROBBINS: That's correct, Your Honor. If we ever actually got to that point of the fact events, this man was doing the same job he had done every day for a long time. We can bring five or 10 people on his crew and say this is what we all do, there's nothing unusual or unreasonable about what he's asked to do. We'll get into a fact dispute with the Plaintiff about how heavy were the rails and was he asked to lift heavier rails that day than usual.

Our expert testimony will be no, he was not. The Plaintiff has --

JUDGE MERRITT: The case is not fully enough developed yet to really know how serious a case it is.

MR. ROBBINS: Well, from a damage standpoint it is. The Plaintiff's deposition and the doctor's deposition have been taken. It is not a serious case from a damage

standpoint. The negligence part of the case is not in discovery at all.

JUDGE MERRITT: Okay.

MR. ROBBINS: This is an abuse of discretion case and I think this is well within the Court's discretion.

JUDGE MERRITT: Thank you, Mr. Robbins. Mr. Leizerman?

MR. LEIZERMAN: Your Honor, very briefly, again understand that much of the work that had to be done included as Mr. Robbins has indicated the naming of an expert, which was done timely. His report was submitted, his curriculum vitae, his fee schedule, his list of testimony. We truly believe that the punishment doesn't fit the wrong.

It was a few months of delay of an order. The Order to Compel came out in November. We didn't respond. The excusable neglect was I truly believe we had placed in the --

JUDGE RYAN: If you did that, why did you file a Motion to Extend? Didn't you file a motion?

MR. LEIZERMAN: That was with regard to the Motion to Dismiss. When we did not respond to the Order from the Court to Compel, then they filed Motion to Dismiss. That one I truly believe -- I dictated it. I had signed it. I had been in trial in the Northern District of Ohio. I expected, you

know, to be out of trial. I asked the Court for a continuance. It gave me that continuance. We thought it was responded to. And candidly I've always believed that the best response in those situations, and it was indicated in the memo, was to give an answer. And to the best of my ability we tried to tell them everything that we had in our possession was submitted. I do believe that the standard has been in this Court not to hold Mr. Harmon responsible for my errors, and I do --

JUDGE MERRITT: Well, he's got a pretty good remedy, doesn't he?

MR. LEIZERMAN: He should not have to go through that, but yes.

JUDGE MERRITT: Well you've got to testify in Cross Examination he had a very good case.

MR. LEIZERMAN: I will not deny it, he had a good case. And his case would be there but for the conduct of his attorney, yes. That will not change. That's -- I would hope that that will be changing the standard, and that the standard should not be changed. There is a time to hold a Counsel and a client responsible, as Judge Ryan has indicated, when the client himself has advantaged himself because of the conduct of an attorney. The client is not advantaged. And quite frankly, our case hasn't been advantaged.

This case was upon schedule to be tried on that time. I have been asked to fly to Nashville --

JUDGE RYAN: Excuse me just a minute. The Coleman case was the HIV contaminated blood case, wasn't it?

MR. LEIZERMAN: Yes, Your Honor.

JUDGE RYAN: That's a case in which Judg Hackett dismissed the case, wasn't it?

MR. LEIZERMAN: Yes.

JUDGE RYAN: And our Panel held to affirm, didn't we?

MR. LEIZERMAN: That is correct. Your opinion was a dissenting opinion.

JUDGE RYAN: Well, I don't memorize all those things I write, but as I recall in that case I was demonstrating why there isn't even an argument in that case, that the client should not be punished for the sins of the lawyer, because the client was party to the action. I don't see that Coleman is --

MR. LEIZERMAN: No, only the rationale. I cited it for your rationale because I thought you appropriately addressed -- and that there were exceptions.

JUDGE RYAN: All right.

MR. LEIZERMAN: I hope this Court finds upon reflection that I truly care. It's not intentional, it's not malicious. It was an option. The cases that were cited by the defense are cases where some attorneys challenged the Court. They had been given lesser sanctions. They have had their hands slapped. That wasn't done here. And I was suggesting he needs to or should -- and I'm saying that --

JUDGE MERRITT: Yeah, we understand. You just kind of went AWOL in this case basically.

MR. LEIZERMAN: In some respects. And we should be penalized. We shouldn't be thrown out of the ball game.

JUDGE MERRITT: The case will be submitted and the Clerk can call the next case.

(Whereupon this hearing was concluded.)

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I hereby certify that this is a true and accurate transcription of the above-entitled matter.

July 25, 1997 /s/ _____
Joan Schimmel